A

CAHAYA UTAMA INDUSTRIES SDN BHD

v.

KONG KAM PENG

B

HIGH COURT MALAYA, SHAH ALAM
KN SEGARA J
[CIVIL SUIT NO: 22-160-93]
1 MARCH 2007

C ***LAND LAW:*** *Trespass - Encroachment on land - Possession of land must be clear and exclusive to support action for trespass - Land not surveyed and boundary not defined - Cause of action for trespass not established - Registrar of Titles and/or Land Administrator directed to resolve boundary dispute by causing a final survey to be made*

D ***TORT:*** *Trespass - Trespass to land - Possession of land - Landlord not in actual occupation of land and not knowing where boundary of land is - No perimeter fencing - Whether landlord can assert any possession of land to allege trespass - Possession of land must be clear and exclusive to support action for trespass*

E The plaintiff's land and the defendant's land were neighbouring lots adjoining each other. The plaintiff had at no time demarcated its land with any perimeter fence to assert its possessory right to a clearly identifiable area and thus prevent encroachment by any owners of any adjoining lots or trespass by anyone. The plaintiff had at no time visibly F defined the boundaries of its land or surveyed its land at any time prior to the defendant going into possession and occupation of the defendant's land. The defendant, too, had not surveyed her land or determined the legal boundaries thereof before going into occupation and possession, upon her purchase of same. In October 1988 the plaintiff filed a suit G against the defendant alleging that the defendant had trespassed onto the plaintiff's land. The plaintiff claimed for possession of the land, demolition of building structures erected thereon, damages, interest and costs.

Held (dismissing the claim for trespass with costs):

H

(1) This case was nothing more than a case of boundary dispute between two adjoining land owners, upon lands that had not been surveyed and boundaries not determined, in accordance to the area of land alienated *vis-a-vis* the original titles relating to the said lands. I (para 7)

(2) There was no evidence that the plaintiff was in actual occupation of the land at any time. Without being in actual occupation, not knowing where the boundary was, and without emplacing any perimeter fencing, the plaintiff was in no position to assert any possession of the land, to allege trespass of the said land by the defendant. (para 12)

(3) Possession of the land by the plaintiff must be clear and exclusive to support any action for trespass against the defendant. The plaintiff failed to establish clear and exclusive possession of the land before the alleged encroachment by defendant. (para 13)

(4) The Registrar of Titles and/or Land Administrator shall resolve the boundary dispute between the plaintiff and defendant by causing a final survey to be made for the respective lands owned by the plaintiff and the defendant and immediately, thereafter, to cause final titles to be issued to the plaintiff and defendant for the respective lands. (para 16)

Case(s) referred to:
Senik v. Hassan & Anor [1963] 1 LNS 120 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 166(1)(a)(iii), 170(2)(c)

For the plaintiff - Rajesh Kumar; M/s Joseph Yeo
For the defendant - Ng Chek; M/s Ng Chek & Co

Reported by Amutha Suppayah

JUDGMENT

KN Segara J:

[1] The plaintiff (formerly known as Kaohyee Timber Company Sdn. Bhd.) is the legal owner of land held under title Q.T.(M) 28 Lot 586 Mukim of Sungai Buloh, State of Selangor since 15 February 1984 (see exh. D18) [formerly known as Roll of Approved Applications No. 403/59 (380/59) dated 21 June 1966 (see exh. D6)]. It states very clearly at the bottom of exh. D6:

> Surveyed area 2 acres (blank) roods (blank) poles.
>
> Exchanged for Qualified Title No. (M) 28 Lot No. 586 Mukim of Sungei Buloh.

A This 21st June, 1966

Sd. & Sealed
Collector of Land Revenue

[2] The titles in continuation for Q.T.(M) 28 Lot 586 (exh. D18) are
B H.S.(M) 4848, No. P.T. 586, Mukim of Sungai Buloh, State of Selangor (exh. D17) and final title No P.M. 97, No. Lot 19578 Mukim of Sungai Buloh, State of Selangor (exh. P11). The said final title was issued by the Land Office on 29 August 1988 after a survey was conducted and approved on 20 August 1988. On 30 March 1994 title
C P.M. 97 was sub-divided into:

1) H.S.(M) 9022, No. PT 27048, Mukim of Sungai Buloh, State of Selangor (exh. D4).

2) H.S.(M) 9023, No. PT 27049, Mukim of Sungai Buloh,
D State of Selangor (exh. D5).

3) Simpanan Jalan.

4) Kawasan Kubor.

E **[3]** The defendant is the legal owner of land held under Q.T.(M) 30 Lot 587, Mukim of Sungai Buloh, State of Selangor since 18 August 1984 (see exh. Dl) [formerly known as Roll of Approved Applications No 374/59 (376/59) dated 21 June 1966 (see exh. D26)]. It clearly states at the bottom of exh. D26:

F Survevyed area 1 acres 2 roods 00 poles.

Exchanged for Qualified Title No. (M) 30 Lot 587 Mukim of Sungei Buloh.

This 21st day of June, 1966.

G

Sd. & Sealed
Collector of Land Revenue

[4] The titles in continuation for Q.T.(M) 30 Lot 587 are H.S.(M) 4489, No. PT 587, Mukim of Sungai Buloh State Of Selangor
H (exh. D2) and H.S.(M) 9403, No. PT 587, Mukim of Sungai Buloh, State of Selangor (exh. D3).

[5] In October 1988 the plaintiff filed a civil suit against the defendant at the Sessions Court Klang (62-777-88) alleging that the defendant had trespassed onto the plaintiff's land. The plaintiff claimed for possession
I of the land, demolition of building structures erected thereon, damages, interest and costs (see p. 3, Bundle A). The defendant's defence (as amended) claimed various declaratory reliefs (see pp. 7-13 Bundle A).

The civil suit was eventually transferred from the Sessions Court and registered in the High Court, Shah Alam (22-160-93). The plaintiff did not file any defence to the defendant's counterclaim.

[6] The plaintiff's land and the defendant's land are neighbouring lots adjoining each other. The plaintiff had at no time demarcated its land with any perimeter fence to assert its possessory right to a clearly identifiable area and thus prevent encroachment by any owners of any adjoining lots or trespass by anyone. The plaintiff had at no time visibly defined the boundaries of its land at any time prior to the defendant going into possession and occupation of the defendant's land. The plaintiff had at no time surveyed its land, prior to the defendant going into possession and occupation of the defendant's land, and asserted its rights to such surveyed land and its boundaries. The defendant, too, had not surveyed her land and determined the legal boundaries of the defendant's land before going into occupation and possession, upon her purchase of same.

[7] Upon a consideration of all the evidence by the plaintiff and the defendant, it is manifestly clear that the plaintiff is barking up the wrong tree in filing a suit against the defendant for trespass and damages. This case is nothing more than a case of boundary dispute between 2 adjoining land owners, upon lands that had not been surveyed and boundaries not determined, in accordance to the area of land alienated vis a vis the original titles relating to the said lands. The plaintiff is attempting to steal a march to a substantial increase in area in land from that originally allotted. Upon issue of a title in continuation, as replacement for a damaged title, the plaintiff conducted a survey immediately to obtain a final title. The plaintiff, thereafter, alleged encroachment of its land by the defendant.

[8] For the purposes of the just determination of this suit it is salutary to keep in mind, at all times, the provisions of s. 166 National Land Code (NLC) 1965, relating to circumstances in which title in continuation may be issued, and s. 170 NLC, with regards to the form and contents of documents in continuation of title to land. Relevant to the facts of this case will be s. 166(1)(a)(ii) which reads:

> (1) The circumstances in which title in continuation may be issued under this Chapter to any land as a whole are as follows
>
> (a) where the Registrar or [Land Administrator] decides with respect to the register document of title thereto -
>
> (i) ...

A (ii) at any time, that the document can, by reason of its physical condition, no longer be used;

and s. 170(2)(c) which reads:

(2) Every such document of title -

B (a)

(b)

(c) shall contain, except in so far as they relate to matters which have ceased to be effective, the like memorials, endorsements, and other entries as are contained in the subsisting register document (but, where that document is a certificate of title issued under any previous land law, setting out in full any conditions and restrictions in interest therein referred to).

D **[9]** The original provisional area of plaintiff's land was 2 acres (see exhs. D6 and D18). The plaintiff had known at all material times, prior to the defendant going into occupation of her land, that the provisional area allotted to it *vis a vis* title D6 and D18 was 2 acres. The plaintiff asserted in evidence that D6 was in a bad condition with cellophane E tape, torn, and not clear. It was taken to the Land Office in Petaling Jaya or Subang for a new title to be issued. The plaintiff did not call anybody from the relevant Land Office to testify.

[10] Tan Hai Seng (SP5) testified for the plaintiff, under examination-F in-chief, *inter alia*:

I am the director and shareholder of the plaintiff company. I cannot re-collect when I was appointed as director of the plaintiff company.

…

G When I was appointed as a director of the company, the plaintiff was the owner of land H.S.(M) 4848.

According to D17 the owner of H.S.(M) 4848 is Kaohyee Timber Company Sdn Bhd.

H …

I bought the shares of Kaohyee Timber Company Sdn Bhd either in 1985 or 1986. I bought 100% shares of Kaohyee Timber Company Sdn Bhd. I then appointed my wife and I as the Directors of Kaohyee Timber Company Sdn Bhd. The new Board of Directors then changed I the name of the company Cahaya Utama Industries Sdn Bhd.

The change of name was registered on 9 August 1988. A

When I was appointed director of plaintiff company H.S.(M) 4848 was an asset of the plaintiff company. There were no other assets. Plaintiff then intended to develop the piece of land.

In 1985 when I bought the shares of Kaohyee Timber Sdn Bhd I knew B the existence of H.S.(M) 4848. At that time I did not know the exact location of the piece of land. In 1985 I knew the exact location of this piece of land. At that time I did not know the exact boundaries of the land (in 1985). I received a title to the land in 1985 from Kaohyee Timber Company Sdn. Bhd. when I bought 100% of its shares. The title was in a bad condition with cellophane tape and torn. It was not C clear. Then I brought this title to the Land Office in PJ or Subang. The officer at the Land Office informed me that I should submit a new application form and when a new title is ready he will notify me by letter. The officer told me to keep the torn and unclear title and to submit application for title. He informed me once the new title is issued I will have to surrender the old title to the Land Office. I was D asked to fill in forms and submit to the Land Office. In the form I was asked to write down the old title number ie, Q.T.(M) 28. The Land Office did inform me that the new title is ready and I was asked to bring the old title to the Land Office. I did go and give the old title to the Land Office. The Land Office gave me a new title and I was asked E to acknowledge receipt. I made the application in 1986 and I received the new title in 1987.

[Bundle C p. 4 (D17) referred to witness]

This was the new title given to me by the Land Office.

F

Upon receiving the new title (D17) I was rather surprised to see the acreage stated therein. The new acreage is 3.1 acres. I asked the Land Office why was this so. I asked the Land Officer whether the acreage of my land is 3.1 acres - ie the plaintiff land. The officer informed me this is a Q.T (M) and the acreage could be more or less.

G

The Land Officer said if I want to know the exact measurement of the land I should go and do a final title. I applied for a final title based on H.S.(M) 4848.

When I received Q.T.(M) 28 from Kaohyee Timber Company Sdn Bhd in 1985/6 I did not know what a final title is. H

My wife and I bought 100% shares of Kaohyee Timber Company Sdn Bhd because this company was indebted to me. I bought the shares of 5 or 6 people who made up the 100% shares.

I was instructed by Land Office to engage a surveyor. In 1987 I I engaged Juru Ukur Raya - one Mr Leong. The Land Office recommended this company as they are more experienced and know what to do.

A The surveyor did conduct a survey but he did not tell me when he did the survey.

Before 1987 Kaohyee Timber Company Sdn Bhd occupied this lands. After the survey was done I am able to ascertain the boundary of the land.

B When Kaohyee Timber was occupying the land Kaohyee did not put up any fence to demarcate their land.

When my wife and I bought 100% shares of Kaohyee Timber, we did not put up any perimeter fence to demarcate our land on Q.T.(M) C 28. On 27 April 1987, my wife and I did not put up any perimeter fence on Q.T.(M) 28 which became H.S.(M) 4848. I agree that in 1996 the lease on H.S.(M) 4848 expired. My wife and I did not put up any perimeter fence right up to the expiry of the lease in 1996

I did not put up any perimeter fence, as I did not know where the D boundary was.

I obtained the final title to H.S.(M) 4848 on 29 August 1988. My surveyor applied.

Under cross-examination, SP5 testified *inter alia*:

E It is true I said in examination-in-chief that my Q.T.(M) 28 title was badly torn and I had submitted to Land Office to issue with a new title.

[Bundle C p. 4 exh. D17]

F I did not pay any premium for this title. I was not asked to pay. It was in replacement of Q.T.(M) 28 which I handed over to the Land Office because it was badly torn.

I did not pay any premium for the 1.18 acres in excess of 2 acres found on land H.S.(M) 4848 given in replacement of Q.T.(M) 28.

G

[Bundle C pp. 6-8 referred to witness - (P11)]

This P.M. 97 is my final title of H.S.(M) 4848.

P.M. 97 is a title in continuation ofH.S.(M) 4848.

H In re-examination, SP5 testified, *inter alia*:

I did not pay any premium on the excess land in H.S.(M) 4848 over Q.T.(M) 28 because the government did not ask me or notify me.

I **[11]** It is without doubt very clear, from the evidence of SP5 that when he and his wife bought 100% shares of Kaohyee Timber, they did not put up any perimeter fence to demarcate their land Q.T.(M) 28

which became H.S.(M) 4848. SP5 also conceded that when Kaohyee Timber was occupying the land, Kaohyee did not put up any fence to demarcate its land. SP5 agreed in his testimony that the lease on H.S.(M) 4848 expired in 1996, and that he and his wife did not put up any perimeter fence right up to the expiry of the lease in 1996. SP5 conceded in his testimony that he did not put any perimeter fence as he did not know where the boundary was. SP5 (and his wife) are the alter ego of the plaintiff company in this civil suit.

[12] There was no evidence that the plaintiff was in actual occupation of Q.T.(M) 28 and the titles in continuation at any time. Without being in actual occupation, not knowing where the boundary was, and without emplacing any perimeter fencing, the plaintiff is in no position to assert any possession of the land, to allege trespass of the said land by the defendant. In *Senik v. Hassan & Anor* [1963] 1 LNS 120, Suffian J held:

> The law of trespass is in my view also quite clear.
>
> Trespass is an injury to a possessory right. The plaintiff must have been in possession at the time of the trespass. Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support the action. It is not necessary that the plaintiff's possession should be lawful and actual possession is good against all except those who can show a better right of possession in themselves

[13] Possession of the land by the plaintiff must be clear and exclusive to support any action for trespass against the defendant. The plaintiff has failed to establish clear and exclusive possession of the land before the alleged encroachment by the defendant. In the circumstances, the plaintiff's claim for damages against the defendant for trespass is dismissed with costs.

[14] With reference to the defendant's counterclaim, upon a consideration of all the evidence before me very carefully, I find that the defendant has not proved any fraud on the part of the plaintiff, beyond reasonable doubt. However, on the whole of the evidence before this court, it is very clear, especially from the evidence of Leong Teng Boon (DW1), who was the Chief Surveyor, Selangor in April 1988, that he would not have approved the final survey (exh. D16A) submitted by the plaintiff's surveyor, Leong Yew Kuan (SP3), if he was aware of the encroachments as shown in the demarcation plan (exh. P10) prepared by SP3. It was very clear from DW1's evidence that exh. P10 was never submitted to him by the plaintiff's surveyor, together with the final survey, or in any other way brought to his attention by the plaintiff, its servants or agents. DW1 testified, *inter alia*:

In April 1988 I was the Chief Surveyor, Selangor Survey Department. My name appears on this certified plan PA 10-05716759 (exh. D16A). I approved this survey on 26/4/1988.

[P10 referred to witness]

This is merely a plan to show what is purported to be indicated on the plan made by the licensed surveyor concerned. It is not an approved plan.

This plan (P10) shows purported encroachments on Lot 19578.

[P 10 cross-referred to D16A]

I don't remember seeing this plan at all in June 1987. When I approved D16A, I was not aware at all of the existence of P10. P10 was never submitted to me and to my office to the best of my knowledge.

I definitely would not have approved plan D16A on 26 April 1988 as the Pengarah Ukur, Selangor if there were purported encroachment on Lot 19578.

As Pengarah Ukur Selangor if there were encroachment on Lot 19578, I would have rejected the plan submitted by the licensed surveyor and returned the file to him, telling him of the encroachment. As far as the Survey Department is concerned everything submitted must be in order otherwise we would reject it. We will not hold any enquiry.

The field book of the surveyor submitted to the Survey Department must show any encroachment which is natural or artificial found at the time of survey especially near the disputed common boundaries of owners of land.

…

As far as I can remember, nothing was shown in all the pages of the field book submitted to the Department by Mr. Leong Yew Kuan with reference to artificial or natural features along the boundaries of the land Lot 19578.

…

[Bundle E p. 1 referred to witness]

I agree that based on the information on this page of the Field Book the survey is in respect of Lot 19578.

[Bundle C pp. 6, 7 and 8 referred to witness (P11)]

Based on this document of title Lot 19578 is in respect of Lot 586 H.S.(M) 4848.

There is no obligation by a licensed surveyor to plot the neighbouring lands to a land under survey by him for the purposes of issue of a final title to the owner of same.

[P10 referred to witness]

If the surveyor found the artificial features like the fence - line, factory foundation, semi concrete building, in 1987 when he did a survey, the field-book should show all the features. He is duty bound to do so by survey regulations.

Under cross-examination DW1 testified *inter alia*:

[D 16A referred to witness]

This is the plan approved by me and forms part of the final title. The final title is not issued by the Survey Department. It is issued by the Land Office. The final title is prepared by the Survey Department and a copy of the approved plan of the land surveyed is attached to the Final Title. However, the final title is issued by the Land Office.

As far as I know during my time at the Survey Department, Selangor no application was made by any of the owners of neighbouring lots to 19578 for final title

[16] In view of DW1's evidence I am satisfied that the plan attached to the Final Title No PM 97 Lot 19578 Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor (exh. P11) must be set aside. Any reliance placed on the said plan for any subsequent sub-divisons and alienations to the plaintiff is also set aside. Pursuant to s. 417 NLC the Registrar of Titles is directed to rectify all records relating to D16A as the final survey plan in exh. P11. The Registrar of Titles and/or Land Administrator is hereby directed to resolve the boundary dispute between the plaintiff and defendant by causing a final survey to be made for the respective lands owned by the plaintiff and the defendant based on Q.T.(M) 28 (exh. D18) and Q.T.(M) 30 (exh. D20) and immediately, thereafter, to cause final titles to be issued to the plaintiff and defendant for the said respective lands. The parties herein shall be at liberty to sue for possession and damages, if any, after the issue of fresh final titles pursuant to such final survey.

[17] There shall be costs to the defendant on the counterclaim.